SEMANTAN ESTATE [1952] SDN. BHD.

v.

COLLECTOR OF LAND REVENUE WILAYAH PERSEKUTUAN

SUPREME COURT, KUALA LUMPUR
LEE HUN HOE CJ (BORNEO)
HASHIM YEOP SANI SCJ
SYED AGIL BARAKBAH SCJ
[CIVIL APPEAL NO. 195 OF 1985]
4 APRIL 1987

ADMINISTRATIVE LAW: *Mandamus - Whether application for an order of mandamus is a suit, action or proceeding - Public Authorities Protection Act 1948 - Conduct of applicant to be taken into consideration - Mandamus - Whether will be issued where there is an alternative remedy - Locus standi - Discretionary power as to issue of order of mandamus.*

This was an appeal against the decision of the High Court in striking out an application for an order of *mandamus*. The appellant was in possession of over 700 acres of land which the Selangor Government decided to acquire 250 acres in 1956. The appellant raised various objections at the hearings and finally the parties agreed to waive certain irregularities to facilitate the making of a decision. The respondent had made an award which was much lower than what the appellant asked for. The High Court had declined jurisdiction as the reference was not expressly made within the provisions of s. 22 of the Land Acquisition Enactment. The appellant had a right of appeal against that decision but had apparently been advised not to appeal.

Then by an *ex parte* originating motion dated 9 August 1983, the appellant made an application for leave to apply for an order of *mandamus* directed at the respondent to complete the acquisition procedure. Leave was granted to do so. By summons-in-chambers dated 12 October 1984, the respondent applied for the originating motion to be struck out on two grounds. The learned Judge presiding decided in the respondent's favour on the ground that the institution of the originating motion was barred by virtue of s. 2(a) of the Public Authorities Protection Act 1948 ("the Act"). The other ground related to undue delay.

The appellant appealed. The main issue was whether the application for an order of *mandamus* is a suit, action or proceeding within the meaning of the Act.

Held:

[1] The appellant had a right of appeal against the decision of the High Court but had never availed himself of it. Instead he applied for an order of *mandamus* long after his right to the remedy lapsed. There must be an end to litigation and the process of the Court should not be allowed to be abused. Under such circumstances, the appellant must be regarded as having elected to accept the *status quo* since he did not enforce his right by appealing against the decision of the High Court in declining jurisdiction. He must take the consequence of his election.

[2] Regarding the important question of the appellant's standing: he must have a specific legal right to ask the Court to exercise its discretion to issue the order of *mandamus*. If the appellant has no such right then he is not entitled to mandamus. As he has failed to avail himself of the alternative remedy of the right of appeal, it is too late for him to say that he has no alternative remedy. He therefore has no specific legal right to apply for *mandamus* in this case. Where the delay is long *mandamus* will not be issued.

[3] The learned Judge was right to refuse leave not only because it is within the Act but also because the appellant has not exhausted his right of appeal against the decision of the High Court in declining to act. The issue of an order of *mandamus* is strictly a matter of discretion. In order to ascertain whether it is proper or not to grant the remedy the Court is entitled to take into consideration not only the conduct of the applicant but also the surrounding circumstances of the case.

[Appeal dismissed with costs.]

Cases referred to:

Semantan Estate [1952] Ltd v. Collector of Land Revenue [1960] 26 MLJ 300
Government of Malaysia v. Lee Hock Ning [1973] 2 MLJ 51
Rex v. The Port of London Authority, ex parte Kynoch Ltd. [1919] 1 KB 176
Rex v. Hertford Union [1914] 111 LT 716
Merrick v. Liverpool Corporation [1910] 2 Ch 449
Lim Yew Hock v. The Municipal Commissioners of the Town & Fort of Malacca [1936] MLJ 44
Harrop v. Mayor of Ossett [1898] 1 Ch 525
Bradlaugh v. Clarke [1883] 8 App Cas 354
Tennekoon v. Duraisamy [1958] AC 354
Maliban Biscuit Manufactories v. R. Subramaniam & Ors. [1971] AC 988
A.G. v. Shrewsbury Bridge Co. [1880] 42 LT 79
Johnson v. Refuge Assurance Co. Ltd. [1913] 1 KB 259
Roberts v. Battersea Metropolitan Borough [1914] 110 LT 566
R. v. Westminster Assessment Committee etc. [1917] 2 KB 215
Tennekoon, Comr for Registration of Indian & Pakistani Residents v. Duraisamy [1958] AC 354; 2 All ER 479
Smith v. Chorley District Council [1897] 1 QB 532
Davies v. Gaslight & Coke Co. [1909] 1 Ch 208
Rex v. Dunsheath [1951] 1 KB 127
Re Application by Hamid bin Hassan, Hamid bin Hassan v. Returning Officer, Karak & Ors. [1979] 2 MLJ 183
Manggai v. Government of Sarawak [1970] 2 MLJ 41
Be Kim Kin v. The Collector of Land Revenue [1967] 2 MLJ 89
Chandrasegaram v. The Prime Minister of the Federation of Malaya [1958] MLJ 279

Legislation referred to:

Civil Procedure Code 1917 (Cap 7) s. 41
Land Acquisition Enactment (Cap 140) ss. 4(i), 6(i), 22
Courts Ordinance No. 3 1946 s.19
Public Authorities Protection Act 1948 (Act 198), s. 2(a)
Public Authorities Protection Ordinance 1948, s. 2(a)

Other sources referred to:

Crown Practice, Short and Mellor, 2nd Edn., p. 219
Halsbury's Laws of England, 4th Edn., Vol. 37, para. 17, p. 24

For the appellant - Isabella de Silva; M/s. Chooi & Co.
For the respondent - T. Selventhiranathan, SFC (Tee Geok Hock, FC with him)

JUDGMENT

Lee Hun Hoe CJ (Borneo):

This appeal is against the decision of Harun J in striking out an application for an order of *mandamus*.

Semantan Estate [1952] Sdn. Bhd., the appellant, is a company incorporated in Malaysia in 1952 under the Companies Ordinance 1940 and has been carrying on the business of planters, cultivators, growers, exporters of and in rubber and other crops. It was in possession of over 700 acres of land held under C.T. 12530 Lot 4647. The Selangor government decided to acquire considerable acreage of land in the vicinity. So, pursuant to s. 4(i) of the Land Acquisition Enactment (Cap. 140) (hereinafter called "the Enactment") the Selangor government published notification 401 in the Selangor government *gazette* on 26 July 1956. This was followed by the declaration under s. 6(i) of "the Enactment" and published as notification 577 in the said *gazette* on 25 October 1956. Hearing was fixed on 20 November 1956. At the hearing the appellant was given a plan showing the boundaries of the areas to be acquired amounting to 250 acres. The appellant raised various objections and at the appellant's request hearing was postponed to 27 November 1956. The appellant asked for RM13,000 per acre. Award was made for RM5,282 per acre for 250 acres. Possession was duly taken on 3 December 1956. Subsequently, the Selangor Government gave notice of withdrawal under s. 49 of "the Enactment" from the acquisition on 22 January 1958 in respect of an area known as plot "B" consisting of 22 acres 1 rood 24 poles. Two plots of land known as plots "C" and "D" were found to be outside the acquisition. By another notification 117 published in the said *gazette* on 6 March 1958 the Government proposed to acquire the said two plots "C" and "D" consisting of 60 acres 2 roods 27.5 poles. The result was that the area finally acquired was 263.272 acres. Hearing was fixed on 18 June 1958 but postponed a number of times and was finally abandoned on 24 March 1959. To resolve the difficulty the parties agreed to waive all irregularities. A reference was made to the High Court in *Semantan Estate [1952] Ltd. v. Collector of Land Revenue* [1960] 26 MLJ 300. The position was made clear by Ong J, as he then was, at p. 302:

> ... Thereafter it was sought to solve the problem by agreement to the effect that the whole area finally acquired by Government was to be deemed to have been acquired by virtue of the Notification No. 401 of 26 July 1956, and that the award by the Collector in respect of such area was at the rate of RM5,282 per acre, as against a claim of RM13,000 per acre by the applicants.
>
> The additional acquisition under Notification 117 of 6 March 1958, cannot possibly be included in the award of 27 November 1956, or in the reference, as has been done. No award has ever been made in respect of this additional area. The only way it could have been included in that award was under the provisions of s. 51, which was in the circumstances impossible.
>
> I therefore hold that I have no jurisdiction under the Enactment to entertain the reference because it is not, in fact, a reference based upon the award of 27 November 1956, or any award. The Court has jurisdiction only under s. 22. The parties themselves cannot, by an agreement to waive irregularities in procedure and to seek a reference, confer jurisdiction on the Court dehors the Enactment. Only Parliament can do so. Since this reference is expressly made under s. 22 of the Enactment, there is only one proper course open to me, and I must decline to act.

Thereafter, following an exchange of correspondence between the parties, the matter came to rest. In 1963 the acquired land was subdivided into 38 lots and each given a separate title - all in the name of the Federal Land Commissioner.

Then by an *ex parte* originating motion dated 9 August 1983 the appellant made an application for leave to apply for an order of *mandamus* directed at the respondent to complete the acquisition procedure. On 8 December 1983 Hamzah J, as he then was, granted leave. Pursuant to the order the appellant by notice of originating motion dated 20 December 1983 applied for an order of *mandamus*. By summons-in-chambers dated 12 October 1984 the respondent applied for the originating motion to be struck out on two grounds. Harun J decided in respondents's favour on the ground that the institution of the originating motion is barred by virtue of s. 2(a) of the Public Authorities Protection Act 1948 (Act 198) (hereinafter referred to as "the Act"). The other ground related to undue delay. The appellant appealed.

Section 2(a) of "the Act" reads:

> 2. Where, after the coming into force of this Act, any suit, action, prosecution or other proceeding is commenced in the Federation against any person for any act done in pursuance or execution or intended execution of any written law or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such written law, duty or authority the following provisions shall have effect-
>
> (a) the suit, action, prosecution or proceeding shall not lie or be instituted unless it is commenced within thirty-six months next after the act, neglect or default complained of or, in the case of a continuance of injury or damage, within thirty-six months next after the ceasing thereof;

The main issue is whether the application for an order of *mandamus* is a suit, action or proceeding within the meaning of "the Act". There is no definition in "the Act" as to the meaning of suit, action of proceeding. *Government of Malaysia v. Lee Hock Ning* [1973] 2 MLJ 51 was cited to show that English authorities before 1954 would be relevant as our law was the same as English law up to 1954. In that case, in dealing with s. 2(a) of the Public Authorities Protection Ordinance 1948, Lord Kilbrandon stated:

> ... That section substantially reproduces s. 1 of the United Kingdom Public Authorities Protection Act 1893, as amended by the Limitation Act 1939 s. 21(1), and the appeal has accordingly been presented on the basis of the law of the United Kingdom as it was until the passing of the Law Reform (Limitation of Actions, etc) Act 1954.

Numerous cases were cited in support of their contentions by the parties. We do not propose to go into all those cases. The submission of the appellant is that the principle emerging from the cases cited by her illustrates that *mandamus* does not come within the meaning of "action". The difficulty in supporting this contention is that in none of the cases could we find the reason why the application of the prerogative writ was not within the meaning of "action, prosecution or proceeding" of the Public Authorities Protection Act 1893. There are also cases which went the other way.

In *Rex. v. The Port of London Authority, ex parte Kynoch Ltd.* [1919] 1 KB 176 the Court, without deciding, inclined to the view that the six months' limitation to actions, prosecutions, and proceedings prescribed by s. 1 of the Public Authorities Protection Act 1893 does not apply to the prerogative writ of *mandamus.* As Sir John Simon K.C. who argued the appeal pointed out that the same view was expressed by Avory J in *Rex v. Hertford Union* [1914] 111 LT 716 as an obiter that the Act had no application to the prerogative writ of *mandamus.* However, he went on to stress that there seemed to be no authority for that view. This was clearly illustrated in Short and Mellor's *Crown Practice*, 2nd Edn., p. 219 that the words of the Act were wide enough to include the writ. In the earlier case of *Merrick v. Liverpool Corporation* [1910] 2 Ch. 449 where the plaintiff commenced an action for *mandamus*, Eve J, taking into account the plaintiff's conduct, held that the Public Authorities Protection Act 1893 was a complete answer to the claim. This is what he said at p. 460:

> This conclusion disposes of the plaintiff's claim to the *mandamus*, but I desire to add that had I accepted the plaintiff's construction I should have felt great hesitation, after all that has happened, and the attitude which the plantiff has adopted, in making any order, and, further, that in my opinion the Public Authorities Protection Act of 1893 would have afforded a complete answer to the claim. The cause of action accrued on 12 October 1904, or within a reasonable time thereafter, and I do not think the facts that the statutory neglect has continued to the present time and that it has been to the plaintiff's advantage to refrain from enforcing the statutory obligation could legitimately be regarded as operating to prevent the application of the statute. In such circumstances the plaintiff must be treated as having elected to accept the *status quo* in preference to enforcing her statutory right, and must put up with the consequences flowing from such election.

All these cases were referred to in *Lim Yew Hock v. The Municipal Commissioners of the Town & Fort of Malacca* [1936] MLJ 44, which is an instructive case but in no way totally support the contention of the appellant. In that case the Court dismissed the application of the plaintiff for a *mandamus* to compel the defendants to exercise their discretion properly in the issue of a licence to the plaintiff's rubber factory. That decision was made when the word "suit" was not included in "the Act".

In construing the word "action" both parties cited *Harrop v. Mayor of Ossett* [1898] 1 Ch. 525; *Bradlaugh v. Clarke* [1883] 8 App. Cas. 354 364; *Tennekoon v. Duraisamy* [1958] AC 354 and *Maliban Biscuit Manufactories Ltd. v. R. Subramaniam & Ors.* [1971] AC 988. Halsbury's *Laws of England*, 4th Edn., Vol. 37 para. 17 p. 24 on action states:

> 'Action' means any civil proceedings commenced by writ or in any other manner prescribed by rules of Court. It has a wide significance as including any method prescribed by those rules of invoking the Court's jurisdiction for the adjudication or determination of a lis or legal right or claim or any justiciable issue, question or contest arising between two or more persons or affecting the status of one of them. In its natural meaning 'action' refers to any proceeding in the nature of a litigation between a plaintiff and a defendant. It included any civil proceedings in which there is a plaintiff who sues, and a defendant who is sued, in respect of some cause of action, as contrasted with proceedings, such as statutory proceedings which are embraced in the word 'matter'.

In the note below it is stated that among proceedings which have been held to be actions are relator actions *A.G. v. Shrewsbury Bridge Co.* [1880] 42 LT 79, County Court actions *Johnson v. Refuge Assurance Co. Ltd.* [1913] 12 KB 259, *mandamus* proceedings *Roberts v. Battersea Metropolitan Borough* [1914] 110 LT 566; *R. v. Westminster Assessment Committee etc.*, [1917] 2 KB 215, and a civil suit or action in appeal to the Privy Council, *Tennekoon, Comr for Registration of Indian and Pakistani Residents v. Duraisamy* [1958] AC 354; 2 All ER 479.

On the other hand, the respondent submitted that the English cases would not really assist us as our law developed differently. Prior to 1948 the Act was in *pari materi*a to the English Public Authorities Protection Act 1893. But in 1948 the word "suit" was introduced into the Act. There would not be any reason to include "suit" if "suit" and "action" are the same. It is contend that the word "suit" has a much wider meaning and cannot be subject to restriction. Under our law *mandamus* is issued by the Court as an order in a suit. It is the submission of the respondent that the protection given by s. 2(a) of the Act therefore applies to *mandamus* on "suit, action or proceeding" because the word "suit" was not used in the English Act. In reply the appellant stressed that the Act must be construed from the intention expressed by the legislature in the Act itself and not by comparing definitions of the word "suit" and "action" in other statutes where the definitions are made for the purpose of those statutes.

Section 41 of the Civil Procedure Code 1917 (Cap. 7) provides that "Every suit shall be instituted by presenting a plaint to the Court or such officer as it appoints on its behalf". Section 42 prescribes the content of a plaint. The appellant submitted that the inclusion of the word "suit" in the Public Authorities Protection Ordinance 1948 was because prior to the revision of law in 1948 the Civil Procedure Code 1917 (Cap. 7) used "suit" while s. 19 of the Court Ordinance Malayan Version No. 3 of 1946 used "action" as description of proceedings in Court. She thought the drafts-man might have wanted to ensure protection of the Ordinance in all adversory proceedings by inclusion of the word "suit".

When a person feels aggrieved at the hands of the authority concerned in respect of his rights he wants a remedy and redress of his grievance. In this case there are difficulties. The conduct of the appellant must be taken into consideration. The matter happened so long ago and also the fact that the appellant had agreed to waive certain irregularities no doubt to facilitate the making of a decision. The respondent had made an award which was much lower than what the appellant asked for. The High Court had declined jurisdiction as the reference was not expressly made within the provision of s. 22 of the Enactment. The appellant had a right of appeal against that decision but had apparently been advised not to appeal. In effect the appellant had a remedy but had never availed himself of it. Instead, he applied for an order of *mandamus* long after his right to the remedy lapsed. There must be an end to litigation and the process of the Court should not be allowed to be abused. Under such circumstances, he must be regarded as having elected to accept the *status quo* since he did not enforce his right by appealing against the decision of the High Court in declining jurisdiction. He must take the consequence of his election.

Mandamus will not be issued where there is an alternative remedy available: *Smith v. Chorley District Council* [1897] 1 QB 532, *Davies v. Gaslight & Coke Co.* [1909] 1 Ch 208, *Rex v. Dunsheath* [1951] 1 KB 127. Thus in Re Application by *Hamid bin Hassan, Hamid bin Hassan v. Returning Officer, Karak & Ors.* [1979] 2 MLJ 183 where the right or liability is created by statute which gives a special remedy for enforcing it, *mandamus* was refused. In the same way in *Manggai v. Government of Sarawak* [1970] 2 MLJ 41 where the appellant sought a declaration against the decision of the Resident's Court instead of appealing to the Native Court of Appeal the Federal Court held that no declaratory judgment could be made where there was an alternative remedy. He could not use the procedure relating to declaration but should use the procedure laid down relating to appeal to the Native Court of Appeal.

Mallal at p. 643 has this to say:

> The issue of a prerogative order is at the discretion of the High Court and it will not be made 'if the conduct of the applicant had been such as to disentitle him to the relief asked for': see, *inter alia*, *Badat bin Drani v. Tan Kheat* [1953] MLJ 67 or where the applicant has failed to avail himself of other statutory remedies: *Melayu Raya Press Ltd. v. Colonial Secretary* [1951] MLJ 89 or he has failed to contest the validity of the proceedings in the statutory forum; *Choo Yin Loo v. Registrar of Societies* [1957] MLJ 228; Re Application by Loke Wan Tho [1956] MLJ 149. See also *Stanley v. Bull* [1952] MLJ 65.

Then there is the important question of the appellant's standing. He must have a specific legal right to ask the Court to exercise its discretion to issue the order of *mandamus*. Such discretion must be exercised judicially. If the appellant has no such right then he is not entitled to *mandamus*. As has been pointed out he has a right of appeal against the decision of the High Court in refusing to hear the reference. He has failed to avail himself of the alternative remedy. This point was not seriously contended by the parties before the learned Judge. We think it is too late for him to say he had no alternative remedy. Accordingly, we are of the view that he has no specific legal right to apply for *mandamus* in this case.

It is unfortunate that we do not have the benefit of the grounds of judgment to enable us to know exactly what was in the mind of the learned Judge when he dismissed the application of the appellant. In our view, in the interest of the high standard of public administration, a Judge should assist the appellate Court by giving reasons as are adequate to enable the appellate Court to ascertain whether the learned Judge is in error in reaching his decision. He may have taken into account irrelevant consideration or omitted to take into account relevant consideration. What are "adequate" reasons would depend on the circumstances of each case. Had he decided to refuse to issue the order of *mandamus* on the ground of undue delay we would have no difficulty in dealing with the matter. Delay in this case is so clear that it would disentitle the appellant to the remedy. Where the delay is long *mandamus* will not be issued. Thus in *Ee Kim Kin v. The Collector of Land Revenue* [1967] 2 MLJ 89 the Court refused to issue *mandamus* because of the delay of over four years in making the application. So, also *Chandrasegaram v. The Prime Minister of the Federation of Malaya* [1958] MLJ 279 where Sutherland J took the view that the application for *mandamus* should be refused owing to the long delay.

We can see no good reason in giving the word "suit" in "the Act" the restricted meaning which has been advanced. The fact that the word may be construed differently under a different legal system does not necessarily mean that we are not justified in giving the same word a different meaning in the light of local circumstances and development peculiar to our own legal system. As Bankes LJ said in *Rex v. Port of London Authority, ex parte Kynoch Ltd.* (*supra*) at p. 183:

> Every case must depend on its own particular circumstances; but decided cases furnish some rules which ought to govern the Court in the exercise of its discretion to grant or refuse the prerogative writ of *mandamus*. There must be something in the nature of a refusal to exercise jurisdiction by the tribunal or authority to whom the writ is to be directed. A refusal may be conveyed in one of two ways: there may be an absolute refusal in terms, or there may be conduct amounting to a refusal ...

There were clearly irregularities in the acquisition. The position was stated lucidly by the late Ong J, as he then was. Suffice for us to say that in the circumstances *mandamus* could not be issued. However, we consider the learned Judge was right to refuse leave not only because it is within "the Act" but also because the appellant has not exhausted his right of appeal against the decision of the High Court in declining to act.

The issue of an order of *mandamus* is strictly a matter of discretion. In order to ascertain whether it is proper or not to grant the remedy the Court is entitled to take into consideration not only the conduct of the applicant but also all the surrounding circumstances of the case. The procedure of the Court cannot be abused as there must be an end to any litigation.

Accordingly, we would dismiss the appeal with costs both here and the Court below. The deposit is to be paid to the respondent on account of taxed costs.

Also found at [1987] 2 CLJ 199